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COURT OF CRIMINAL APPEALS OF TEXAS

W. L. GELLING,

Appellant,

vs.

THE STATE OF TEXAS,

Appellee

STATEMENT AS TO JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

In compliance with Rule 12 of The Rules of the Supreme Court of the United States, Appellant submits herewith his statement showing the basis on which the Supreme Court has jurisdiction on appeal to review the judgment of the Court of Criminal Appeals of the State of Texas in this cause.

Opinions Below

The opinion of the Court of Criminal Appeals has not yet been reported. It appears at p. 176 of the Record and is attached hereto as Exhibit A. The County Court for Harrison County delivered no opinion. Its charge to the jury appears at R. — (Transcript p. 39). The judgment and sentence appear at R. — (Transcript p. 42).

Basis of Jurisdiction

The judgment of the Court of Criminal Appeals sustaining the Appellant's conviction and sentence was entered

January 30, 1952. A petition for the allowance of an appeal was presented herewith on March 13, 1952.

The Court of Criminal Appeals is the court of last resort in Texas in all criminal matters (Vernon's Annotated Criminal Statutes, Code of Criminal Procedure, article 53).

The cause is one in which the validity of an ordinance of the City of Marshall, Texas, was drawn in question on the ground of its being repugnant to the Constitution of the United States and the decision was in favor of its validity. The Supreme Court, accordingly, has jurisdiction on appeal under U. S. Code, Title 28, Sec. 1257 (2). *Lovell* v. *Griffin*, 303 U. S. 444; *Jamison* v. *Texas*, 318 U. S. 413.

Statute Involved

The statute, the validity of which was drawn in question, is an ordinance of the City of Marshall, Texas, of February 8, 1921, requiring the submission to a Board of Censors on demand of any motion picture exhibited within the City and prohibiting the exhibition of a picture disapproved by the Board as "of an immoral character, or of such character as to be prejudicial to the best interests of the people of said City, if publicly shown." Violation of the ordinance is declared a misdemeanor, punishable by a fine of up to $200. The full text of the Ordinance is appended hereto as Exhibit B.

Nature of the Case

Appellant is the manager of the Paramount Theatre in Marshall, Texas. In regular course of business he booked the motion picture "Pinky," a Twentieth Century-Fox production, for exhibition on February 12, 13, and 14, 1950 (R. , Statement of Fact, p. 39). On February 9 the City Commission of Marshall "reactivated" the Board of Censors established by the ordinance of 1921 (R. , State-

ment of Fact, pp. 8-9), designating five new members, and that Board demanded the submission of the picture for approval. (R. , Statement of Fact, pp. 38-9). The picture was submitted prior to its public exhibition and on February 11, 1950, the Board disapproved its showing, stating in writing its "unanimous opinion that the said film is prejudicial to the best interests of the citizens of the City of Marshall" (R. 141, Statement of Fact, p. 15). The picture was nonetheless exhibited on February 12, 13 and 14 without untoward incident.

A complaint filed February 15 in the Corporation Court charged the appellant with the misdemeanor of exhibiting the picture in violation of the Ordinance (R. , Transcript, p. 4). The appellant was arrested and released on bail (R. , Statement of Fact, p. 24). After trial without a jury, judgment of conviction and a fine of $100 (R. , Transcript, pp. 6-7), appellant appealed to the County Court for Harrison County where the case was tried *de novo* before a judge and jury. The County Court rendered a judgment of conviction on a jury verdict, sentencing appellant to pay a fine of $200 and costs (R. , Transcript, pp. 41-43). The Court of Criminal Appeals sustained the judgment and the sentence.

The Constitutional Questions

The appeal presents three questions under the Constitution of the United States:

(1) Whether the Marshall Censorship Ordinance is invalid on its face as a prior restraint of freedom of speech and press, in violation of the First Amendment, made applicable to the States by the Fourteenth;

(2) Whether the Ordinance, in authorizing prior restraint on the vague and indefinite ground that a motion picture is "of such character as to be prejudicial to the

best interests of the people" of the City "if publicly shown", conflicts with the Amendments;

(3) Whether the Ordinance, as applied to bar the exhibition of the motion picture "Pinky" conflicts with the Amendments.

The questions were raised by appellant in accordance with the State procedure and decided in favor of the validity of the Ordinance.

They were raised on motion to quash the complaint (R. , Transcript, pp. 10-12) and motion for instructed verdict (R. , Transcript, pp. 27-29). The motions were overruled (R. , Transcript, pp. 17, 38) and the case submitted to the jury on the single question whether the appellant had exhibited the picture after disapproval by the Board (R. , Transcript, pp. 39-40).

They were decided by the Court of Criminal Appeals in affirming the conviction. The Court, relying on *Mutual Film Corp.* v. *Ohio Industrial Commission*, 236 U. S. 230, and *RD-DR Corp.* v. *Smith*, 183 F. (2d) 562 (5th Cir.), *cert. den.* 340 U. S. 853 sustained the validity of the Ordinance upon the broad ground that the exhibition of a motion picture is excluded from the speech and press protected by the First and Fourteenth Amendments. The decision thus affirmed the validity of the Ordinance on its face and also necessarily sustained it as applied to bar the exhibition of the motion picture "Pinky".

The Questions Are Substantial

1. Whether the First and Fourteenth Amendments impose no limits on prior restraint of motion picture exhibition, as the Court of Criminal Appeals has held, presents a most substantial question. The issue is, indeed, broader in this respect and thus *pro tanto* more substantial than that posed in *Burstyn* v. *Wilson*, No. 522 This Term, in which the Su-

preme Court noted probable jurisdiction February 4, 1952 (20 L.W. 3211).

The decision that the motion picture, unlike every other medium of mass communication, is excluded from the speech and press protected by the Constitution rests, as has been said, on *Mutual Film Corp.* v. *Ohio Industrial Commission.* But the authority of that decision has been undermined by supervening changes of both law and fact. Its reaffirmation in the face of these decisive changes, calls emphatically for examination and correction by the Supreme Court.

(a) *Mutual Film* was decided in 1915 prior to the great decisions of the Supreme Court holding the First Amendment guarantees embraced within the limitations imposed on the States by the Fourteenth Amendment. Indeed, the *Mutual* opinion confines the discussion of the claim of an impairment of free speech and press to that asserted under the state constitution.

Since *Gitlow* v. *New York,* 268 U.S. 652, the Supreme Court has held the Federal protection to include each medium for the expression of ideas presented at its bar. *Near* v. *Minnesota,* 283 U.S. 697 (newspaper); *Lovell* v. *Griffin,* 303 U.S. 444, *Schneider* v. *State,* 308 U.S. 147 (leaflets); *Thornhill* v. *Alabama,* 310 U.S. 88 (picketing); *Stromberg* v. *California,* 283 U.S. 359 (flag display); *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (salute); *Cantwell* v. *Connecticut,* 310 U.S. 296 (phonograph); *Saia* v. *New York,* 334 U.S. 558 (loud speaker); *Winters* v. *New York,* 333 U.S. 507 (magazine); see also *Hannegan* v. *Esquire,* 327 U.S. 146 (picture in magazine); *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 226-7 (radio).

The exclusion of the motion picture from the scope of First Amendment safeguards is accordingly anomalous and totally anachronistic. That the exclusion is no part of

present law was indicated in *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 166, where Mr. Justice Douglas, writing for the Court, said: "We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment."

Mutual Film, we submit, can not have been untouched by these developments of almost forty years.

(b) This legal change has been accompanied by a no less transforming change of fact, judicially known to the Court but documented by appellant's testimony on motion to quash (R. —, Transcript pp. 86-119; Statement of Fact, pp. 54-59).

The motion picture of the time of *Mutual* was primitive and understandably assimilated to a "circus" or a "spectacle" (R. —, Transcript, p. 86, etc.); see Ramsaye, *A Million and One Nights: A History of the Motion Picture* (1926) Vol. I, pp. 50-73, 70-90; Vol. II, pp. 414-424; Hamptin, *A History of the Movies* (1931) pp. 6-8, 12-13, 38-44, 128-130. The motion picture of today is not alone a major form of modern art but undeniably a basic medium for the expression and communication of ideas on all issues—old and new—that beset modern life. Indeed, the cinema has made such central contribution to the art of mass communication that it has largely modified the older forms of publication which now utilize pictoral techniques far more than the mere written word. See *e. g.*, Vitray, *Pictorial Journalism* (1939) pp. ix-xi, 3-8; Note, *Motion Pictures and the First Amendment*, 60 Yale L. J. 696 (1951). The point is illustrated by the record in this case. Both LIFE and LOOK presented stories of the motion picture "Pinky", consisting largely of still photographs taken from the film. They circulated freely within Marshall (R. —, Transcript, pp. 107-108).

Mutual can not have been untouched by these developments. It is familiar law that change of fact affords the basis for sustaining challenge on due process grounds that failed before the change occurred. *Chastleton Corporation* v. *Sinclair*, 264 U. S. 543, 547-548; *Abie State Bank* v. *Bryan*, 282 U. S. 765, 772. Here there has been relevant change in both the motion picture and the other forms of publication.

The newspaper and magazine retain their constitutional protection notwithstanding their reliance on pictorial techniques. A publication is protected even though it presents "nothing of any possible value to society". *Winters* v. *New York*, 333 U. S. 507, 510. We submit that under present facts there is no basis for sustaining that protection and denying it to motion pictures, which present much of great "value to society". That one form of communication is printed and the other flashed upon a screen can hardly ground a constitutional distinction. cf. *Lovell* v. *Griffin*, 303 U. S. 444, 452.

(c) If, as we contend, the exhibition of a motion picture is protected by the First Amendment safeguards, the Marshall Ordinance is clearly void. It lays a prior restraint upon speech and press—not in terms of time or place or circumstances—but in terms of the contents of the motion picture, the ideas expressed. This is the classic form of invalidity. *Near* v. *Minnesota*, 283 U. S. 697, 713; *Lovell* v. *Griffin, supra; Largent* v. *Texas*, 318 U. S. 418; *Thomas* v. *Collins*, 323 U. S. 516.

2. Whether the Ordinance prescribes a standard of restraint too vague to satisfy the Constitution presents a substantial question, assuming *arguendo* that prior restraint is not *per se* invalid.

The ordinance purports to direct the Board to bar exhibition of a picture if it is "of the opinion" that the picture is "of such character as to be prejudicial to the best interests

of the people of said City, if publicly shown." This was the ground on which the Board denied approval in this case. (R. , Statement of Fact, p. 15.)

A standard of restraint in terms so vague embodies no criteria. It is an open invitation to the Censor to prescribe whatever he dislikes or disapproves. Assuming, without conceding, that a State has power to restrain the exhibition of a motion picture, that power must be limited to the prevention of abuses that the State may properly control. No such limitation is embodied in the Ordinance. No disciplining finding is required by the Board. The "village tyrants" (*Board of Education* v. *Barnette*, 319 U.S. 624, 638), the bigot or fanatic, seated in the office of the Censor, here encounter nor restraint by law.

Power so unmeasured by specific legal limits can not be employed to control First Amendment freedom, if, indeed, it can be used to limit liberty at all. *Hague* v. *C.I.O.*, 307 U.S. 496; *Cantwell* v. *Connecticut*, 310 U.S. 296; *Saia* v. *New York*, 334 U.S. 558; *Niemotko* v. *Maryland*, 340 U.S. 268; *Kunz* v. *New York*, 340 U.S. 290. We submit that here, as in the cases cited, the restraint must fall upon the ground that no "narrowly drawn, reasonable and definite standards for the officials to follow" (*Niemotko* v. *Maryland, supra*, at 271) have been prescribed.

The vice of a restraint undisciplined by relevant and concrete standards is well illustrated by the record in this case. Three members of the Board of Censors testified at the trial (R. , Statement of Fact, pp. 9-23). Among the explanations of their actions that they gave was that the picture "created the impression of racial intermarriage" (R.—, Statement of Fact, p. 10) though no such intermarriage admittedly occurs; that "several scenes in the picture . . . might tend to create disunity or break down the har-

mony existing between the races here in Marshall" (R. —, Statement of Fact, p. 13); that "the thing sort of advocated the mixing of the races. It takes you sort of up to it; it didn't happen. It seemed o me to advocate miscegenation" (R.—, Statement of Fact, p. 21).

That such ruminations can occur within the framework of the Ordinance shows plainly the peril to freedom when relevant, specific standards have not been prescribed.

3. Whether the Ordinance is valid as applied to bar and punish exhibition of the motion picture "Pinky" presents a third substantial question.

The County Court received in evidence, on the motion to quash, the dialogue and continuity of the picture taken from the screen (R. , Transcript p. 106). It rejected, however, a print of the picture on the ground that its reception would be an invasion of the "administrative rights of the Censor Board" (R. , Transcript pp. 113-114). In the discussion on the ruling, the appellant disclaimed an intent to challenge the action of the Board of Censors as an abuse of discretion under the Ordinance. But the disclaimer on this point was accompanied by insistence that the picture was admissible upon the question of validity (Trans. p. 115) which both the motion to quash and the motion for direction challenged "on its face, and as applied to the defendant" (R. , Transcript pp. 11-12, 28-29).

We submit, therefore, that the validity of the Ordinance as applied to bar and punish exhibition of the motion picture "Pinky" was properly drawn in question; and that the judgment necessarily affirmed its validity as so applied, *Fiske* v. *Kansas*, 274 U.S. 380; *Herndon* v. *Lowry*, 301 U.S. 242, 255; *Taylor* v. *Mississippi*, 319 U.S. 583, 589; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282. Whether the Court of Criminal Appeals failed to decide the ques-

tion[1] or decided it adversely to appellant is immaterial upon this point. *Lawrence* v. *State Tax Commission*, 286 U.S. 276, 282.

On this branch of the case, the "inquiry then is whether the statute is constitutional as applied and enforced in respect of the situation presented" (*Fiske* v. *Kansas*, supra, at 385). The testimony and the dialogue and continuity show without contradiction what the "situation" was.

The motion picture was produced by Darryl F. Zanuck, directed by Elia Kazan and featured Jeanne Crain, Ethel Barrymore and Ethel Waters. It is based upon a novel entitled "Quality", by Cid Ricketts Sumner (R , Transcript pp. 102-4). The story is in brief as follows:

The picture opens with scenes of the humble southern home of Pinky's Negro grandmother. Pinky, a light complexioned Negro girl who has been "passing" in the North as white, has returned home to visit. While in the North she had become a registered nurse. Shortly after her arrival, Miss Em, an old southern aristocrat, whom her grandmother loved and served, suffers a heart attack. Pinky is persuaded to stay and nurse her. Shortly thereafter a white man, Tom, appears looking for Pinky. It becomes clear that they had been engaged to marry while Pinky was in the North, that he was unaware of her Negro heritage, and that she had run away from him when she came South. He learns that she is colored, but says he loves her nonetheless and kisses her. When he urges her to return North with him, however, she insists that she

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[1] The Court said: "The name and character of the picture exhibited are immaterial. The objection which was lodged against the picture by the Board of Censors is immaterial to the discussion of this case, because it is not claimed that they abuse the discretion lodged in them, but the contention is made that the ordinance was invalid." (R.).

must stay and nurse Miss Em. She promises to return when Miss Em recovers.

Miss Em dies and Pinky is preparing to leave when she learns that Miss Em named her as residuary legatee of her estate, which includes an old house. She also learns that Miss Em's relatives intend to contest the will. Pinky determines to assert her rights, despite the disapproval of the community and the protests of Tom, who has returned to be with her. A trial follows which results in a victory for Pinky, despite the indications of community hostility.

After the trial Tom urges Pinky to sell the old house and to marry him. He proposes that they go and live in Denver, admitting that the publicity of the trial is partially responsible for his decision not to return to his home in Boston. Pinky then realizes that she can not marry Tom and tells him so. When he protests and urges her to "get away", she answers, "I am a Negro. I can't forget it and I can't deny it. I can't pretend to be anything else and I don't want to be anything else." Tom departs and Pinky resolves to follow the suggestion of a Negro doctor that she apply her talents to improve the conditions of the Negro in the South and convert the house she has inherited into a clinic for Negro children. The picture ends with scenes of the new clinic.

The testimony of three members of the Board of Censors show that their objection to the picture rested basically on three grounds, (1) that it depicts a white man retaining his love for a woman after learning that she is a Negro; (2) that it depicts a white man kissing and embracing a Negro woman; (3) that it includes a scene in which two white ruffians assault Pinky after she has told them she is colored. (R. 10, 13-14, 21).

It is too clear for argument that exhibition of this motion picture, acclaimed as it has been as a mature and dignified

artistic treatment of a moving human problem, threatens no substantive evil that the State has power to prevent. The fact that it may give expression to ideas about the human race that some may disapprove is not an evil. This is the basic meaning of the First Amendment. "To many this is, and always will be folly; but we have staked upon it our all" (L. Hand, J. in *United States* v. *Associated Press*, 52 F. Supp. 362, 372 [D.C. N.Y.]). If, as we contend, the motion picture is within the speech and press protected by the First Amendment and the liberty protected by the Fourteenth, an Ordinance applied to sanction the suppression of this picture is repugnant to the Constitution.

Beaumont, Texas, March 13, 1952.

Respectfully submitted.

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EXHIBIT "A"

APPEAL FROM HARRISON COUNTY

No. 25,210

W. L. GELLING, *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

OPINION

Appellant was tried in the County Court of Harrison County on October 24th, 1950, and was found guilty by a jury which assessed a fine of $200.00 on a complaint charging him with unlawfully exhibiting a motion picture contrary to an ordinance of the City of Marshall.

The case was tried *de novo* on appeal from the corporation court. The facts show that he exhibited a picture that was objectionable to the duly appointed Board of Censors of the City of Marshall, after they had notified him of their disapproval of the picture and instructed him not to exhibit the same.

The facts of the case are without dispute. The name and character of the picture exhibited are immaterial. The objection which was lodged against the picture by the Board of Censors is immaterial to the discussion of this case, because it is not claimed that they abused the discretion lodged in them, but the contention is made that the ordinance was invalid and the reasons relied upon are the basis for this opinion.

This case was submitted before this court some months ago and has been on the desk of the writer and has been examined by other judges of the court, through that period of time, at permissible intervals. The questions raised have required and received extensive investigation, but the importance of other cases on a crowded docket have superseded the questions in this case in the matter of final decision. Hence the delay.

There are certain questions involving the regularity of the passage of the ordinance, but the only questions that we will discuss to any extent involve the application of the First and Fourteenth Amendments to the Constitution of the United States. The attorneys on both sides have filed extensive briefs which have been very helpful in coming to a conclusion on the questions raised. Much of the discussion in appellant's brief has been along the line of contentions made in other cases which have been before several courts in recent years and may be denominated as an eloquent plea that this court over-rule the holding of the Supreme Court of the United States in *Mutual Film Corp. v. Industrial Commission of Ohio*, 236 U.S. 230, decided in 1915. After careful consideration of this case and many of the cases which have followed and referred to it, particularly those cited by appellant, we have come to the conclusion that the most logical and positively correct expression is found in the case of *RD-DR Corporation, et al. v. Smith, et al.*, 183 Fed. 2d 562, opinion by Chief Judge Hutcheson of the U. S. Court of Appeals, New Orleans. Having so concluded, we content ourselves with following that opinion after first stating some of the contentions made in appellant's brief.

The brief reviews the evidence of appellant and calls attention to his statement that the picture involved had been reviewed by both *Life* and *Look*, magazines that are sold and distributed in Marshall. Apparently the position is that since this was done there is no point in barring the picture, regardless of what it may be. The position is taken, further, that the motion picture to the extent that it partakes of the features of the magazines in the field of entertainment and education, is entitled to the same protection as the press and entitled to the same freedom. On the subject and in behalf of this position, I doubt if we could find or that there may be presented a stronger argument than that in appellant's brief. Most of it has been discussed and referred to in other reported cases, but there is one feature that especially attracts our attention as being new and different. The extent of the investment in the show houses and in equipment and fixtures approximate

$100,000, which is a substantial investment in property and building. The thought is that this investment indicates a permanence and removes a fear discoverable in the *Mutual* case as to the responsibility of the exhibitors. An examination of the *Mutual* case does not impress us that the court was moved to any degree by such a fear. Even in 1915 the position of the motion picture seems to have been well established. Further answer to the interesting discussion on this subject is not called for.

Neither do we find in the reported cases "that there is an indication" in recent Supreme Court decisions "that there has been a shift of emphasis in the court's attitudes." The opinions of the several Federal District Courts and Appellate Courts speaking on the subject have not pointed out a discoverable change of sentiment helpful to appellant in the question. We pretermit discussion of the several cases placed in appellant's brief and confine our thinking, chiefly, to Judge Hutcheson's opinion in *RD-DR Corporation, et al. v. Smith, et al., supra.*

The question discussed in that opinion is based on what appears to be the same contention made by appellant in his brief in the instant case, that is that the *Mutual Film Corporation v. Industrial Commission of Ohio, supra,* has either been superseded or that the drift of the opinions of the Supreme Court has been so far from the position taken by that court in 1915 that we cannot rely upon the opinion in that case as controlling in the case now before us. As we view the brief it is conceded by appellant that the *Mutual* case is in point and decisive and that it sustains the position of the state in the instant case. Such would be our conclusion even in the absence of such admission. However much we have been enlightened by the brief, we are not in accord with the conclusions which it asks us to reach. The Supreme Court of the United States may extend the Fourteenth Amendment to include motion pictures, and thus nationalize the industry and remove it from state and municipal control, but we are not expecting this until it has done so, and certainly will not yield that important function on behalf of the state and the municipality until we are forced to do it. We respect the decisions

of that great court to the extent that we do not feel that we should speculate on a change of sentiment and a reversal of its sound opinions of so long standing. To engage in guessing what the court is going to do next is not to follow its decisions as contemplated by the oath which the members of this court take. We do not hesitate to comply with that oath when the decisions of that court have been given. We are firmly entrenched in our position that we should not depart from its decisions even if we were faced with uncertainties, a fact we do not admit. We find that the Supreme Court has frequently had opportunity to reconsider its holding in the *Mutual* case and that it has consistently refrained from doing so.

As stated by Judge Hutcheson in the opinion referred to, we see no useful purpose in reviewing the several attacks which have been made and which have failed to secure any modification of the holding in the *Mutual* case. We think the opinion was an expression of law, a correct interpretation of the Fourteenth Amendment as applied to the matter before the court at that time, and we find no reasonable ground for a change of the application even at this distant day. We cannot concede that the motion picture industry has emerged from the business of amusement and become propagators of ideas entitling it to freedom of speech. If in fact circumstances have developed surrounding the industry whereby television can bring to the youth of our cities, and even of rural areas, matters which are improper and even though magazines of a type are circulated through the U.S. mails which present ideas derogatory to the proper development of good citizens, yet we cannot concede that this has divested the municipal authorities of a right to regulate such subjects. If some are exposed to evil, if evil it be, there is within such fact no argument that other and all evil should be strewn in the path of our youth. The desire of a great industry to reap greater fruits from its operations should not be indulged at the expense of Christian character, upon which America must rely for its future existence. Every boy and every girl reaching manhood or womanhood is, to an extent, the product of the community from which he comes. If the

citizens of that community are divested of all power to surround them with wholesome entertainment and character building education then their product will go forth weak indeed. If the community surrenders its power voluntarily, if the state does, then we may expect our Federal Government to move into fields with which it should not be encumbered and in which it cannot best serve. Our loyalty to our government is based on an appreciation for its efficiency. We cherish the history of a Federal Government which has been based on a Constitution as solid as the rocks and whose constancy is not shifted by the changing winds. It is the duty of this court, and of all courts, to follow the mandates and stay within the powers of our constitutional provisions. This is fundamental. To speculate on its meaning, to predict a change in the attitudes of the court toward it, is contrary to our ever thinking.

Other questions raised by this appeal have been considered and are deemed to be of little importance. We cannot sustain them. The judgment of the trial court is affirmed.

BEAUCHAMP, *Judge.*

(Delivered January 30, 1952.)

EXHIBIT "B"

"AN ORDINANCE, regulating Theatres, Moving Picture Shows, Tent Shows, and other places of amusement, prescribing a mode for the censorship of all pictures and vaudeville shows exhibited in picture shows, tent shows, theatres, and other places of amusement and providing penalties and declaring an emergency.

Be it Ordained by the Commission of the City of Marshall:

Sec. 1. A Board of Censors is hereby created, to consist of five members, either men or women, who shall be residents and citizens of the City of Marshall, and who shall

be appointed by, and shall hold their office at the pleasure of the Commission.

Sec. 2. Said Board of Censors shall have authority, and it is hereby made its duty to examine and censor any and all pictures or vaudeville shows which may be offered by any picture theatre or show for public exhibition. If, upon such censorship or examination, said Board is of the opinion, that such picture or vaudeville so proposed to be exhibited is of an immoral character, or of such character as to be prejudicial to the best interest of the people of said City, if publicly shown, then said Board of Censors shall notify the owner or operator of the show or theatre proposing to exhibit the same of such fact and that it shall be unlawful for any person or persons, firm or corporation to publicly exhibit any such picture or vaudeville at any picture show, theatre, tent show, or other place of amusement, after having been notified in writing by the Board of Censors that such picture or vaudeville does not meet with approval of said Board of Censors.

Sec. 3. Said Board of Censors, or a majority of the same, shall have the right at all reasonable times to examine and censor any and all pictures or vaudeville shows, received by any picture show or theatre for public exhibition, and it shall be the duty of the owner, or owners, or person or persons in charge of any such show or theatre, when requested by said Board of Censors, or a majority thereof, to exhibit such picture or pictures on the screen of said theatre, or show, in order that said Board may examine and censor same.

Sec. 4. Any person or persons, firm or corporation refusing to exhibit any picture, when requested by the Board of Censors to do so, shall be deemed guilty of a misdemeanor and upon conviction shall be fined in any sum not less than Twenty-Five ($25.00) Dollars nor more than Two Hundred ($200.00) Dollars, and each separate failure to comply with the request of said Board shall constitute a separate offense.

Sec. 5. Any person or persons, firm or corporation, who shall present any picture or vaudeville performance after

they have been notified in writing, by said Board of Censors, that same does not meet with the approval of said Board of Censors, shall be deemed guilty of a misdemeanor and shall upon conviction thereof be fined in any sum not less than Twenty-five nor more than Two Hundred Dollars, and each presentation or performance shall constitute a separate offense.

Sec. 6. Said Board of Censors shall receive no compensation for their services, provided, however that if in the examination or censorship of said picture said Board of Censors are compelled to expend any money in the performance of such duty, then such sum shall be paid by the show or theatre for whom such duty is performed, and shall be charged for and collected by the City in the same manner as license fees for the operation of such show or theatre are charged and collected.

Sec. 7. By reason of the class of pictures shown and vaudevilles publicly exhibited from time to time an emergency is hereby declared to exist requiring this ordinance to be passed under the emergency clause of the City Charter and upon request of the Commission it is now in open meeting of the regular session of the Commission of the City of Marshall, passed as an emergency measure and it is further ordained that this ordinance take effect from and after its passage and approval and publication as required by law.

Passed this the 8th day of February 1921.
Ayes 3; Noes None.
Approved this the 8th day of February, 1921.
Attest: H. S. Rice.

A. M. Finley,
Chairman of the Commission."

finions of censors

Mrs. Yahiel R 136

Mrs. Wells R 139-140

Mrs. Abney R 147-141 ("I think the fil
was immoral, because it seemed to
advocate miscegenation.")

Ste. (R 141) - "It is the unanimous
opinion that the said film is
prejudicial to the best interest
of the citizens of the City of
Marshall; and, therefore, does
not meet with the approval of
the Board of Censors."

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 707

W. L. GELLING,

Appellant

v.

STATE OF TEXAS

APPEAL FROM THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

PRICE DANIEL,
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E. JACOBSON,
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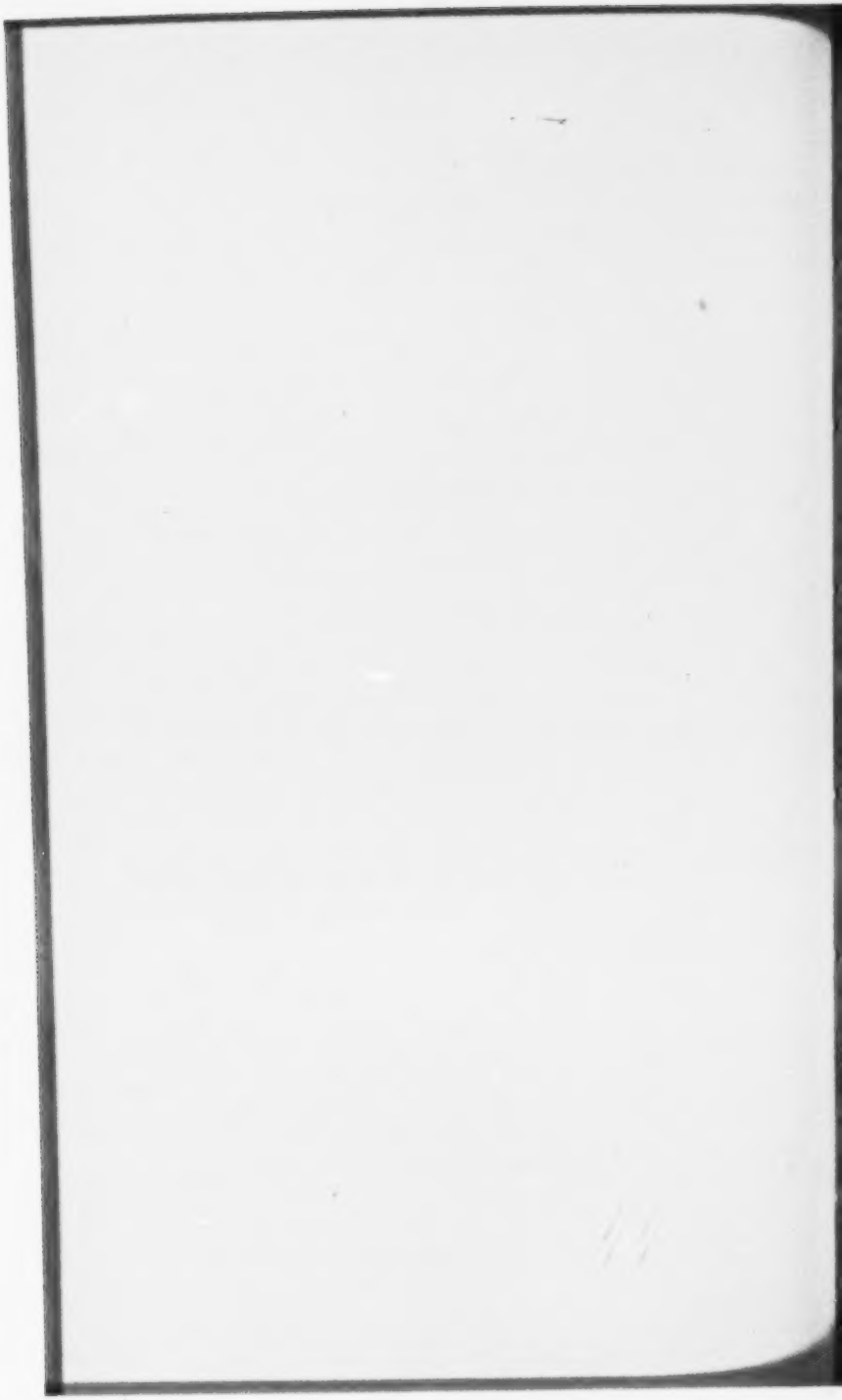

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IN THE COURT OF CRIMINAL APPEALS
STATE OF TEXAS

No. 25,210

W. L. GELLING,

Appellant

v.

STATE OF TEXAS,

Appellee

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

The appellee in the above-entitled cause for its joint statement in opposition to appellant's statement as to jurisdiction herein, and in support of appellee's motion to dismiss or affirm, respectfully show the following:

I. Statement of Issues on Appeal

The question sought to be presented in this appeal is appellant's claim that an ordinance of the City of Marshall, Texas, establishing a Board of Censors with authority to examine and censor "all pictures or vaudeville shows which may be offered by any picture theatre or show for public exhibition," denies to him freedom of speech and press in violation of the First and Fourteenth Amendment to the Constitution of the United States. This claim appellee denies and the Texas Court of Criminal Appeals,

in the opinion and judgment here challenged, determined the question so raised adversely to appellant. The court concluded that the main question presented by appellant is controlled by *Mutual Film Corp.* v. *Industrial Commission of Ohio*, 236 U.S. 230 (1915), and *RD-DR Corporation* v. *Smith*, 183 F. 2d 562 (C.C.A. 5th 1950) *cert. denied* 340 U.S. 853 (1950).

Appellant here seeks to raise three propositions concerning the constitutionality of the ordinance in question:

1. The ordinance, on its face, is invalid as a prior restraint of freedom of speech and press;

2. The ordinance is vague and indefinite and sets no proper standard for guidance of the administrative body established to administer the ordinance; and,

3. The Board of Censors abused its discretion in banning the exhibition of the particular motion picture involved in this appeal.

II. No Substantial Federal Question Is Presented by the Attempted Appeal

The question presented in appellant's first proposition was clearly presented to the Texas Court of Criminal Appeals and decided by that Court on the basis of the Federal Constitution. The right of a state, or subdivision thereof, acting under the police power, to provide for censorship of motion pictures has been upheld by this Court and is now well settled. *Mutual Film Corp.* v. *Industrial Commission of Ohio, supra.* This has formed the basis of a great body of decisions in the state and lower federal courts. See Notes, 64 A.L.R. 505 (1937) and 126 A.L.R. 1363 (1940). The most recent lower federal court decision involving this issue to reach this Court is *RD-DR Corporation* v. *Smith, supra,* in which the *Mutual Film* case was followed. These decisions are decisive of every point presented in this appeal. There would appear to be no necessity to repeat the arguments in support of the

power sought to be exercised by the City of Marshall since those arguments have been so recently presented to this Court. *RD-DR Corporation* v. *Smith, supra; Burstyn* v. *Wilson,* 303 N.Y. 242, 101 N.E. 2d 665 (1951) *probable jurisdiction noted* 20 Law Week 3211 (February 4, 1952).

It is therefore respectfully submitted that the questions presented in this Appeal have long ago been so definitely determined that no substantial question is presented by this appeal entitling appellant to invoke the jurisdiction of the Supreme Court of the United States. *Zucht* v. *King,* 260 U.S. 174 (1922); Rule 12, Rules of the United States Supreme Court.

Appellant relies upon *Burstyn* v. *Wilson, supra,* to show the substantiality of the questions presented. The lack of time allotted for preparation of this statement prohibits the securing of the briefs in that case in order to determine the exact questions presented. From the available information, it would appear that there is involved in the *Burstyn* case a question which was not before the Court in the *Mutual* case and is not presented in this appeal. No question is here presented with regard to the effect of censorship of motion pictures upon the right of religious freedom. That question, apparently, had not been a subject for decision by this Court and it would appear that is the reason for the Court's action in noting probable jurisdiction in the *Burstyn* case.

III. No Federal Question Is Presented by Appellant's Second and Third Propositions

After deciding that the ordinance of the City of Marshall was not, on its face, in violation of the First and Fourteenth Amendments of the Federal Constitution, the Texas Court of Criminal Appeals stated:

> "Other questions raised by the appeal have been considered and are deemed to be of little importance. We

cannot sustain them. The judgment of the trial court is affirmed."

The grounds for this portion of the decision are not stated in the opinion. It is well settled that where it is not clear whether the judgment in a case of the sort presented here rests on a Federal ground or an adequate state ground, this Court will not review the judgment appealed from unless it affirmatively appears that the Federal question was decided and its decision was essential to a deposition of the case. *Herb* v. *Petcairn*, 324 U.S. 117 (1945).

Appellant's second proposition presents the question of the vagueness or indefiniteness of the ordinance and whether it sets a standard to guide the Board of Censors. On page 2 of the brief for appellee, Texas, in the Court of Criminal Appeals, *Xydias Amusement Co.* v. *City of Houston*,, 185 S.W. 415 (Tex. Civ. App. 1916, error ref.), was cited in support of the judgment of the trial court. In that case the court considered an ordinance of the City of Houston, Texas, which provided that the Board of Censors "grant no permit for the giving of any entertainment or showing of any picture, or series of pictures, which, in the opinion of the Board, is obscene, indecent or immoral, or is contrary to good morals or public decency, or is calculated to promote or encourage racial or sectional prejudice, immorality or indecency. . . ." It was claimed that this ordinance was invalid on the ground that it was unreasonable, vague and indefinite, and that it delegated arbitrary power and authority to the Board of Censors to forbid the exhibition of pictures without refernce to the character of the pictures, there being no standard set out in the ordinance for the guidance of the Board.

In overruling these contentions and upholding the ordinance, the Court stated:

> "Moving picture exhibitions are subject to police surveillance and control in the interest of public

morals, and it is the right and duty of the city of Houston, under its express charter powers and under the general exercise of its police powers, to regulate, permit or forbid such exhibitions, and to this end to appoint a board of censors, clothed with such reasonable authority as is necessary to effect the purposes of their appointment." (185 S.W. at 418.)

The portion of the ordinance of the City of Marshall comparable to that in question in the *Xydias* case provides that:

> . . . If, upon such censorship or examination, said Board is of the opinion that such picture or vaudeville so proposed to be exhibited is of an immoral character or of such character as to be prejudicial to the best interests of the people of said city, if publicly shown. . . ."

This standard is similar in many respects to that examined in the *Texas* case and the Texas Court of Criminal Appeals may properly have based its decision upon that case.

Appellant presents in his third proposition the contention that the Board of Censors abused its discretion in banning the exhibition of "Pinky." Again, there are very adequate state grounds for this portion of the Texas court's decision. It is the rule in Texas, as in most other jurisdictions, that any party aggrieved by an administrative decision is entitled to a judicial review and the administrative action will be overturned if illegal, arbitrary, or capricious. *Board of Firemen's Relief & Retirement* v. *Marks*, — Tex. —, 242 S.W. 2d 181 (1951).

There are, therefore, "adequate state grounds" upon which the Texas Court could have rested its decision of appellant's second and third propositions and, conse-

quently, they do not raise questions which this Court should review.

IV. Appellant's Third Proposition Was Never Presented to the Texas Courts

Appellant admits on page 9 of his Statement as to Jurisdiction that in the trial court "the appellant disclaimed an intent to challenge the action of the Board of Censors as an abuse of discretion under the Ordinance." Appellant does not raise this point in his brief in the Texas Court of Criminal Appeals.

This Court has stated many times that it will not review matters not presented to the State Courts. The statement of Mr. Chief Justice Stone in *McGoldrick* v. *Campagnie Generale Transatlantique*, 309 U.S. 430 (1940), is particularly applicable here:

> "But it is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below . . . In cases coming here from state courts in which a state statute is assailed as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this Court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court.
>
> ". . . In the exercise of our appellate jurisdiction to review the action of state courts we should hold ourselves free to set aside or revise their determinations only so far as they are erroneous and error is not to be

predicated upon their failure to decide questions not presented. Similarly their erroneous judgments of unconstitutionality should not be affirmed here on constitutional grounds which suits have failed to urge before them, or which, in the course of proceedings there, have been abandoned."

Those "reasons of peculiar force" are applicable here since Petitioner attacks the constitutional validity of an ordinance of a city in Texas passed under its delegated legislative authority. This Court has been unwavering in the application of the doctrine that it will not consider points not presented to the highest State court.

WHEREFORE, appellee respectfully moves that the within appeal be dismissed or that the judgment of the Court of Criminal Appeals of the State of Texas be affirmed.

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FILED
APR 15 1952
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1951, No. 707 ....

W. L. GELLING,

Appellant,

—*vs*—

THE STATE OF TEXAS,

Appellee.

REPLY TO MOTION TO DISMISS OR AFFIRM

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Supreme Court of the United States

OCTOBER TERM, 1951, No. ....

W. L. GELLING,
Appellant,

—*vs*—

THE STATE OF TEXAS,
Appellee.

REPLY TO MOTION TO DISMISS OR AFFIRM

Appellant's statement as to jurisdiction sets forth three Federal questions presented by this appeal:

(1) Whether the Marshall Censorship Ordinance is invalid on its face as a prior restraint of freedom of speech and press, in violation of the First Amendment, made applicable to the States by the Fourteenth;

(2) Whether the Ordinance, in authorizing prior restraint on the vague and indefinite ground that a motion picture is "of such character as to be prejudicial to the best interests of the people" of the City "if publicly shown", conflicts with the Amendments;

(3) Whether the Ordinance, as applied to bar the exhibition of the motion picture "Pinky," conflicts with the Amendments.

The appellee contends that the first question raised is unsubstantial; that the disposition of the second and the third rests upon adequate State grounds; and that the third

was not presented in the Texas courts. The points thus made are plainly without merit.

I.

In urging that the first question is unsubstantial, appelee relies, as did the Court below, upon *Mutual Film Corp.* v. *Ohio Industrial Commission*, 236 U. S. 230. The reasons why that decision calls for re-examination by the Supreme Court have been set forth in our statement. We stand upon what is said there.

II.

The contention that the claim of invalidity because of absence of sufficient standards has been answered upon State grounds is, we submit, entirely unintelligible. Invalidity was claimed under the First and Fourteenth Amendments; it can only be disposed of on those grounds. That Texas perceived no objection to the challenged ordinance under the State constitution or to that sustained in *Xydias Amusement Co.* v. *City of Houston*, 185 S. W. 415 (1916) is, of course, irrelevant. Validity under the constitution of the State has been established. Appellant's claim is that the ordinance conflicts with the law of the land. The question was admittedly in issue and no argument is needed to establish that the State's denial of the Federal right asserted cannot be referred to a State ground.

III.

It is also argued that adequate State grounds support the denial of the claim of invalidity as applied to bar the exhibition of the motion picture "Pinky." The ground adduced is the suggestion that appellant might have brought suit to set aside the action of the Board of Censors, citing

Board of Firemen's Relief & Retirement v. *Marks*, 242 S. W. 2d. 181 (1951). But granting arguendo that, despite the absence of a statutory method of review, the law of Texas gives some civil remedy to review an administrative order, the *Marks* case does not hold that such a remedy must be pursued. There is no reason to doubt that in Texas, as elsewhere, absent express statutory provision to the contrary, an administrative order may be challenged in defending a suit for enforcement of the order or a prosecution for its violation. *Cf. Estep* v. *U. S.*, 327 U. S. 114; Davis, Administrative Law, p. 752; Whitney R. Harris, The Administrative Law of Texas, 29 Texas Law Review, p. 214, 223-4 (1950).

Far from being adequate, the alleged State ground does not exist.

IV.

It is contended, finally, that the appellant did not present in the Texas courts the claim that the ordinance was invalid as applied. It is true that the appellant did not claim in Texas an abuse of discretion by the Censors as a matter of State law. But, as we have explained in our statement, this disclaimer was accompanied by an insistence on a challenge to the ordinance as applied, under the First and the Fourteenth Amendments. These are separate issues. The State point was not presented. The Federal point was pressed, as we have shown, upon motion to quash and motion for direction. And the bill of exceptions, which governs in the Texas Court of Criminal Appeals (*Wilson* v. *State*, 225 S. W. 2d, 565, 566)[1] specifically claimed that

[1]See also *Bowers* v. *State*, 167 S. W. 2d 203, 204; *Reed* v. *State*, 162 S. W. 2d 109; *Simpson* v. *State*, 217 S. W. 2d 1013, 1015; *Tishmacher* v. *State*, 221 S. W. 2d 258, 262.

the ordinance was invalid as "applied to the defendant" (R. transcript p. 50, 85).

For the foregoing reasons, we submit that the motion to dismiss or affirm should be denied and that probable jurisdiction should be noted.

New York, New York,
April 14, 1952.

Respectfully submitted,

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No. 707. GELLING v. TEXAS. Appeal from the Court of Criminal Appeals of Texas. *Per Curiam:* The judgment is reversed. See *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, and *Winters* v. *New York*, 333 U. S. 507. *Robert H. Park, Herbert Wechsler, Philip J. O'Brien, Jr.* and *Sidney Schreiber* for appellant. *Price Daniel*, Attorney General of Texas, and *E. Jacobson*, Assistant Attorney General, for appellee. Reported below: 156 Tex. Cr. R. —, 247 S. W. 2d 95.

MR. JUSTICE FRANKFURTER, concurring in the judgment of reversal.

The appellant here was convicted under an ordinance of the city of Marshall, Texas, for exhibiting a picture after being denied a license by the local Board of Censors, and the conviction was affirmed by the Court of Criminal Appeals of Texas. The ordinance authorizes a local Board of Censors to deny a license for the showing of a motion picture, which the Board is "of the opinion" is "of such character as to be prejudicial to the best interests of the people of said City," and makes the showing of a picture without a license a misdemeanor. This ordinance offends the Due Process Clause of the Fourteenth Amendment on the score of indefiniteness. See my concurring opinion in *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 507; and *Winters* v. *Wilson*, 333 U. S. 507.

MR. JUSTICE DOUGLAS, concurring.

The appellant was convicted under an ordinance of the city of Marshall, Texas, for exhibiting a picture after being denied permission to do so by the local Board of Censors. The conviction was affirmed by the Court of Criminal Appeals of Texas. The ordinance authorizes a local Board of Censors to deny permission for the showing of a motion picture, which in the opinion of the Board is "of such character as to be prejudicial to the best interests of the people of said City," and it makes

the showing of a picture after refusal of permission a misdemeanor.

The evil of prior restraint, condemned by *Near* v. *Minnesota*, 283 U. S. 697, in the case of newspapers and by *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, in the case of motion pictures, is present here in flagrant form. If a board of censors can tell the American people what it is in their best interests to see or to read or to hear (cf. *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451), then thought is regimented, authority substituted for liberty, and the great purpose of the First Amendment to keep uncontrolled the freedom of expression defeated.